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MAJORITY--(202) 225-4527
(TTY)--(202) 226-3372
MINORITY--(202) 225-3725
(TTY)--(202) 226-3116

May 3, 2004

Via Facsimile and First Class Mail

Ms. Frances M. Hart
Executive Officer, Executive Secretariat
Equal Employment Opportunity Commission
1801 L Street, NW
10th Floor
Washington, DC 20507

Mr. Joseph DuBray, Jr.
Director
Division of Policy, Planning and Program Development
Office of Federal Contract Compliance Programs
Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210

Dear Ms. Hart and Mr. DuBray:

As Chairman of the U.S. House of Representatives Committee on Education and the Workforce's Subcommittee on Employer-Employee Relations, the subcommittee with principal jurisdiction and oversight over the policy and operations of the Equal Employment Opportunity Commission ("EEOC") and Office of Federal Contract Compliance Programs ("OFCCP"), I write to comment on the proposed "Additional Questions and Answer to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures as They Relate to the Internet and Related Technologies" (the "Proposed Questions and Answers"), published by the EEOC in the *Federal Register* on March 4, 2004.

The Introduction to the Proposed Questions and Answers notes that other UGESP-issuing agencies (which include the EEOC, OFCCP, the Department of Labor, the Department of Justice, and the Office of Personnel Management) (collectively, the "UGESP Agencies") would issue additional guidance and regulations specific to their individual enforcement activities. Accordingly, on March 29, 2004, OFCCP promulgated proposed regulations amending OFCCP

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compliance and recordkeeping requirements with respect to applicants for employment. See Proposed Rule, “Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes” at 69 CFR 16446 (March 29, 2004) (the “Proposed Rule”). Inasmuch as the Proposed Questions and Answers and the Proposed Rule address common issues, the comments set forth below address both proposals and, as indicated above, are being provided simultaneously to the EEOC and OFCCP.

At the outset, I would commend the UGESP Agencies for issuing the Proposed Questions and Answers and the Proposed Rule, both of which seek to amend current reporting and recordkeeping requirements to reflect the realities of the 21st century workforce and our global economic market, and in particular the exponential growth in the use of the internet and electronic data processing technologies. As recognized and set forth in detail in the Background of the Proposed Questions and Answers, the advent of the internet and related technologies as recruiting, selection, and job-seeking tools by employers, job seekers, and third parties has radically altered both the way in which employers advertise for job openings and seek to fill them and the way in which job-seekers and employees seek to find or change jobs.

By issuing these proposals, the UGESP Agencies take a much-needed step in making sure our nation’s workplace laws match and meet the needs, opportunities, and realities of the 21st century workplace. I commend the UGESP Agencies for their efforts, and except as noted below, endorse the Proposed Questions and Answers and the Proposed Rule.

My comments on specific items raised in either or common to both of the proposals are as follows:

Requirement that Applicants Meet Advertised, Basic Qualification for Position. Proposed Question 96 would define an individual as an “applicant” in the context of internet recruitment and selection when the following has occurred: “(1) The employer has acted to fill a particular position; (2) The individual has followed the employer’s standard procedures for submitting applications; and (3) The individual has indicated an interest in the particular position.” 69 CFR 10155. In contrast, OFCCP’s Proposed Rule defines an internet “applicant” as an individual who “(i) Submits an expression of interest in employment through the Internet or related electronic data technologies; (ii) The employer considers the individual for employment in a particular open position; (iii) The individual’s expression of interest indicates that the *individual possesses the advertised, basic qualifications for the position*; and (iv) The individual does not indicate that he or she is no longer interested in the position for which the employer has considered the individual.” 69 CFR 16449 (emphasis added).

The definition contained in OFCCP’s proposed rule more closely tracks the state of the law in this area. It is clear that in addressing the question of discriminatory employment practices, an employer is entitled to require that a prospective applicant meet the minimum qualifications of the position sought. See, e.g., *McDonnell Douglas v. Green*, 411 U.S. 792. Similarly, in assessing a claim of discrimination, the relevant applicant pool against which an employer’s conduct is measured excludes applicants who are not qualified for the job. See, e.g., *Ward’s Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989). In that light, although the examples set forth in Proposed Question 96 implicitly recognize an employer’s rights in this regard

(explaining, for example, that job seekers must show that they meet qualifications of geography and work experience), I urge that this point be made explicit in the final Question 96.

Adopting an identical definition of “internet applicant” in both proposals will ensure that employers are not held to two different standards by two UGESP Agencies. For all of these reasons I would urge that the final Question 96 be amended to include the “basic qualification” requirement set forth in the current Proposed Rule.

Record Retention. The Proposed Rule would require employers to retain “any and all employment submissions through the Internet or related electronic technologies, such as on-line resume or resume databases (regardless of whether an individual qualifies as an Internet applicant under 41 CFR 60-1.3)” 69 CFR 16450. As both a matter of practicality and logistics, this requirement unduly burdens employers, who would be required under the proposed Rule to retain copies of all resumes in a resume database at every moment in time that a search is performed. Given that the contents of any such database change literally from moment to moment, such a requirement is not feasible or reasonable. Moreover, the Proposed Rule this contradicts guidance in Proposed Question 96, which clarifies that individuals who send in unsolicited resume over the internet do not fall within the definition of “internet applicant.” Finally, inasmuch as the Proposed Rule itself includes a definition of “internet applicant” for other purposes, the failure to include this limiting definition with respect to recordkeeping requirements again could potentially subject an employer to multiple standards and obviate the usefulness and purpose of the proposed “internet applicant” definition contained in the Proposed Rule. For these reasons I would suggest that the final Rule require employers only to maintain records of applications who meet the qualifications of an “internet applicant” as defined therein.

Application to All Applicants. As noted above, the UGESP Agencies are to be lauded for their effort to ensure that current laws are keeping pace with technological advances in the workplace. In that light, proposed guidance addressing the specific concerns of internet applicants is welcomed. At the same time, however, guidance not directly related to the manner in which a would-be applicant submits a resume (e.g., the “basic qualifications” standard discussed above) can and should be extended to all applicants. I would urge the UGESP Agencies to incorporate such a change in final Questions and Answers and the final Rule.

Making clear that such standards apply to all applicants, not merely those who submit applications electronically, would ensure that employers are not subject to multiple standards and required to apply two different definitions of “applicant” based solely on the manner in which a job-seeker submits his or her resume. The failure to apply this standard to all applicants will have exactly that effect, and largely result in a triumph of form over substance. At the same time, clarifying that the qualification standard applies to all applicants would address shortcomings in current guidance for non-internet applicants, and, as noted above, more closely track the legal standards applicable to all applicants irrespective of the means by which they

Additionally, I would urge that the final Question make clear that it is the employer’s province to articulate and advertise those standards which a job-seeker must meet to be considered an “applicant,” and that the lawful, non-discriminatory and non-pretextual standards determined by an employer to be necessary for the position be the standard by which the question of applicant is measured.

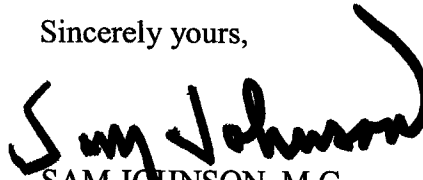
apply for a position. In that light, I would urge the UGESP Agencies to incorporate language appropriately extending the definition of applicant to all employees.

* * * * *

In closing, let me again commend the UGESP Agencies for taking this important step to bring our nation's workplace laws into the 21st century thereby benefiting both employers and employees. I thank you for the opportunity to comment, and trust you will give the recommendations contained herein every serious consideration as you prepare to promulgate final regulations in this important area.

If you would like additional information or clarification of any point raised in these comments, please direct your inquiry to James A. Paretti, Jr., Esq., Workforce Policy Counsel to the Committee on Education and the Workforce.

Sincerely yours,

A handwritten signature in black ink that reads "Sam Johnson". The signature is stylized with a large, sweeping "S" and a long, curved flourish at the end.

SAM JOHNSON, M.C.

Chairman

Subcommittee on Employer-Employee Relations